Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

80-134

In The

Supreme Court of the United States

OCTOBER TERM, 1980

No.

THE BOARD OF EDUCATION OF THE ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE HANNIBAL CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE CENTRAL SQUARE CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE PHOENIX CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MEXICO CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE OSWEGO CITY SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE PULASKI CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE SANDY CREEK CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE FULTON CITY CENTRAL SCHOOL DISTRICT,

Petitioners,

— *vs.* —

GORDON AMBACH, as Commissioner of Education of the New York State Education Department,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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On the Petition:
Dennis E. A. Lynch

QUESTIONS PRESENTED

1. Does the Decision by the Court of Appeals of New York effectively denying Petitioners all remedies to protect their property interests violate the due process clause of the Fourteenth Amendment?

2. Is the law of New York State regarding the statute of limitations for declaratory actions unconstitutionally vague within the meaning of the due process clause of the Fourteenth Amendment?

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Petitioners,

— *vs.* —

GORDON AMBACH, as Commissioner of Education of the New York State Education Department,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

The Petitioners aforementioned respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of New York entered in this proceeding on April 29, 1980.

OPINION BELOW

The opinion of the Court of Appeals of New York, not yet reported, appears in the Appendix hereto (A1-A2). The

opinion of the New York State Supreme Court, Appellate Division, has been reported in 63 A.D.2d 179, 406 N.Y.S.2d 630 (3rd Dept. 1978) and appears in the Appendix hereto (A3-A6). The opinion of the Supreme Court of New York, County of Albany, not yet reported, appears in the Appendix hereto (A7-A12).

JURISDICTION

The judgment of the Court of Appeals of New York was entered on April 29, 1980 (A2). This petition for certiorari was filed within ninety (90) days of that day. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT 14

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioners initiated this action for declaratory and injunctive relief. The action was originally brought in Supreme Court of the State of New York wherein Petitioners sought a declaration that acts of Respondent, Commissioner of Education, violated provisions of the Fourteenth Amendment to the United States Constitution and provisions of state statutory law. The conduct of the Respondent sought to be enjoined was Respondent's assessment of cost allowances to offset full

state aid the Petitioners were otherwise entitled to under state law.

Petitioners are the component school districts of the Board of Cooperative Educational Services of Oswego County, New York (BOCES). Because of a February 1976 enactment to state law, Petitioners and BOCES in March 1976 agreed to acquire certain facilities. The Respondent, however, without formal hearing or notice in May 1976 advised that Petitioners and other school districts in New York would not receive full state aid under the aforesaid enactment to state law. Rather, the Respondent indicated that Petitioners' state aid would be reduced by assessed cost allowances.

After the period had passed for Respondent to pay Petitioners their full share of state aid for the fiscal year in question, Petitioners commenced this declaratory action in July 1977. The Respondent asserted as an affirmative defense to Petitioners' action *inter alia* that the Petitioners' action was not timely brought. The Supreme Court of the State of New York found for Petitioners on the question of its entitlement to full state aid without assessed cost allowances and the timeliness of its declaratory action. On Respondent's appeal, the Appellate Division of the Supreme Court of New York unanimously found again for the Petitioners on all questions decided by the Court below. Thereafter, the Respondent sought and was granted leave to appeal to the Court of Appeals of New York. The Court of Appeals in April 1980 reversed the courts below and found for Respondent solely on the issue that Petitioners' declaratory action had not been timely brought.

Under New York law, when the instant action was brought, challenges to actions of the Respondent could conceivably be made in two methods. The first was by an Article 78 proceeding which had a specific four month statutory period of limitation. The other method of challenging decisions of the Respondent was in a declaratory action which had no specific statutory period of limitation. Under the law as then articulated by the Court of Appeals of New York in *Lakeland Water*

District v. *Onondaga County Water Authority*, 24 N.Y.2d 400, 301 N.Y.S.2d 1 (1969), an Article 78 proceeding was not available to challenge the particular pervasive nature of action taken by Respondent herein. Therefore, Petitioners were relegated to the instant declaratory action with an unspecified statute of limitations, but one necessarily greater than the four month period of an Article 78 proceeding.

Notwithstanding then existing law, the decision by the Court of Appeals of New York in the case at bar held that Petitioners were, in fact, subject to a four month Article 78 statute of limitation. The instant decision by the Court of Appeals of New York in 1980 was rendered notwithstanding its prior holdings on the remedies available to Petitioners herein. The result of the Court of Appeals decision was to bar the action brought by Petitioners, and to provide Petitioners with no remedies to protect their property interests to entitlement of full state aid as found by the courts below. This result by the Court of Appeals of New York was reached despite the federal questions raised by Petitioners herein at their earliest opportunity. (A27-30)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BY THE COURT OF APPEALS OF NEW YORK HAS THE EFFECT OF DENYING THE PETITIONERS ALL REMEDIES TO PROTECT THEIR PROPERTY INTERESTS IN SUCH A MANNER TO CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

It is axiomatic that the highest court of each state has the supreme power to interpret and declare the written and unwritten laws of that state. (*Ward & Gow* v. *Krinsky*, 259 U.S. 503 (1922). Likewise, this Court's power to review decisions of state courts is restricted to those decisions implicating federal questions. (*Quong Ham Wah Co.* v. *Industrial Accident Comm.*, 255 U.S. 445 (1921). Yet, it is equally beyond constitutional cavil that:

> Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States Court as to the effect of a change in decision which fundamentally affects (a party's rights prior to such a change) . . . such rights and obligations should be determined by the law as judicially determined at the time the rights accrued. In every such case, the Federal Courts, while leaning to the view of the State Court as to the validity or interpretation of a law of the state will exercise an independent judgment and will not necessarily follow state judicial decisions rendered subsequently. (*Moore-Mansfield Const. Co.* v. *Electrical Insulation Co.*, 234 U.S. 619, 625 (1914)).

Accordingly, notwithstanding judicial gloss provided by a state's highest court to its statutes or in its decisions, this Supreme Court is free to examine the Petitioners' present claim of an infringement to their federal constitutional rights of due process of law under the Fourteenth Amendment to the United States Constitution. (*St. Louis Southwestern Railway Co.* v. *Arkansas*, 235 U.S. 350, 362 (1914)).

Petitioners' claim in the case at bar is that the Court of Appeals of New York, whether or not cognizant of considerations of judicial economy in its April 29, 1980 decision herein, embraced a new construction which has effectively precluded all remedies Petitioners have to protect their property interests.[1] Furthermore, the Court of Appeals in the instant decision effectively ". . . has given to the new ruling a retroactive bearing, and thereby has made invalid what was valid in the doing." (*Great Northern Railway* v. *Sunburst Co.*, 287 U.S. 358, 364 (1932)). In essence, the Court of Appeals of New York has applied a novel interpretation of the period of limitations for the present declaratory action so as to be then "unforeseeable" to the Petitioners and has therefore deprived Petitioners of fair notice of the time limits to have brought their action. (*Bouie* v. *City of Columbia*, 378 U.S. 347 (1964)).

Support for the proposition asserted by Petitioners that the Court of Appeals of New York has adopted a novel interpretation of the applicable statute of limitations for declaratory actions can be found in the very decisions by the courts below. The Supreme Court of New York rejected the assertion by Respondent that the instant proceeding was barred by the Article 78 four month statute of limitations (A3-A6). The Supreme Court held that Petitioners' declaratory judgment action was timely commenced, notwithstanding any possible alternative procedural remedy. Similarly, the Appellate Division on appeal summarily rejected Respondent's assertion that the proceeding was not timely brought (A11). Obviously, these lower courts considered the question of the applicable statute of limitations for this declaratory action to be so clearly settled in favor of Petitioners' position that detailed discussion was unwarranted. Still, the Court of Appeals of New York in a terse memorandum decision rejected outright Petitioners' claim as untimely brought (A1-A2). Accordingly, it is manifest that the practical effect of this summary determination by the highest New York court is to deprive Petitioners of their property rights without due process of law. (*Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923)).

The fact that the period of limitations for declaratory actions was effectively changed retroactively by the judiciary and not the legislature in New York is not dispositive of Petitioners' claim. As this Court held in *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673 (1930) concerning a similar claim of constitutional infringement:

> If the result above stated (a decision by the highest court in a state) were obtained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. *Ettor* v. *Tacoma*, 228 U.S. 148. The violation is nonetheless clear when the result is accomplished by the state judiciary in the course of construing an otherwise valid (*First National Bank of Greeley* v. *Weld County*, 264 U.S. 450) state statute. The federal guarantee of due process extends to state action through its judicial as well as through its

> legislative, executive or administrative branch of government. (*Id.* at 679-680).

Thus, it is clear that "a decision overruling a prior authority may at times deny a litigant due process if applied retroactively." (*Lemon* v. *Kurtszman*, 411 U.S. 192, 211, 1973) (Douglas, J., dissenting)).

It should be noted that although the Court of Appeals of New York in its instant holding has not expressly overruled a prior decision and given it retroactive effect, the practical impact of this decision is the same. That the Court of Appeals of New York did not categorize its holding as an overruling or a retroactive application does not bind this Court because the Supreme Court is "concerned not with the characterization or construction of the state law by the State Court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state." (*Corn Products Refining Co.* v. *Eddy*, 249 U.S. 425, 432 (1919)). For this Court to slavishly accept the form of a decision by the Court of Appeals of New York would be contrary to a longstanding jurisprudential rule of this august Court "which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." (*Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 126 (1953)). (Citations omitted).

Petitioners rest their claim, that the Court of Appeals of New York herein has applied a novel construction to the applicable statute of limitations, upon the wealth of authority existing when the present declaratory action was brought.[2] Similarly, it had been a long standing principle of New York law that decisions by administrators such as the Respondent, in determining costs to be assessed where a litigant has no prior opportunity for notice or a hearing, are legislative type actions to which an Article 78 proceeding is not available.[3] In fact, the seminal authority on the then issue at bar was rendered by the Court of Appeals in New York in *Lakeland Water District* v.

Onondaga County Water Authority, 24 N.Y.2d 400, 301 N.Y.S. 2d 1 (1969). It was in *Lakeland* that the Court of Appeals of New York held in a similar case "an Article 78 proceeding is not available", however, "they (the petitioners) may challenge (costs assessed by an administrative authority) on any of the grounds open to judicial review of quasi-legislative decisions; namely, that the appellant acted in disregard of statutory standards, in excess of granted authority, in violation of due process or in a discriminating manner. They may also attack the constitutionality of the statute delegating power to act."[4] Therefore, it is manifest that under existing and traditional New York law, when the instant proceeding was brought by the Petitioners, an Article 78 proceeding (A14) with its four month statute of limitations (A13) was inapplicable.

In the case at bar, the Court of Appeals of New York effectively adopted a novel construction of the requisite statute of limitations for constitutional and statutory challenges brought by the Petitioners herein. Inasmuch as the result of the aforesaid judicial action in New York is to preclude exercise of any remedy by the Petitioners to protect their property interests, the Petitioners have suffered a "gross injustice" contrary to the dictates of due process (*Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924)). For the Petitioners, "there has not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process." (*Slochower* v. *Board of Education of New York*, 350 U.S. 551, 559 (1955) (quoting, *Ohio Bell Tel. Company* v. *Public Utilities Commission*, 301 U.S. 292, 302 (1937)).

Although the Court of Appeals of New York, in its decision herein, may have been cognizant of its recent efforts in judicial economy,[5] nevertheless the present decision has fundamentally infringed upon the Petitioners' due process rights under the Fourteenth Amendment to the United States Constitution. As this Court held in its epochal decision in *Brinkerhoff-Faris Trust and Savings Company* v. *Hill*, 281 U.S. 673, 682 (1930):

> (W)hile it is for the State Courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through a judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Again, as the Court in *Brinkerhoff-Faris* implicitly recognized in its conclusion, when a state court has previously construed a statute, Petitioners have a right to rely on that interpretation. (*Id* at 682, fn. 9). Therefore, Petitioners had a right to rely upon the then construction of the applicable statute of limitation and proper procedural remedy for the challenge brought herein. In summary, if the highest court in New York State wishes to change a prior construction, it cannot do so within the confines of the due process clause to the Fourteenth Amendment *ipse dixit* in a *nunc pro tunc* manner. To so act is constitutionally wrong, judicially reprehensible and manifestly unjust. (*Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974)).

II. THE DECISION BELOW HAS EFFECTIVELY DETERMINED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT CONCERNING THE CONSTITUTIONAL PROPRIETY AND VAGUENESS OF STATE ACTION AGAINST THE PETITIONERS.

Assuming *arguendo* that the Court of Appeals of New York has not unconstitutionally rendered a *nunc pro tunc* construction of the applicable law for the periods of limitation in declaratory actions, still state law concerning the remedies available to the Petitioners was and is unconstitutionally vague.

The controlling decision cited by the Court of Appeals of New York in its holding at bar is *Solnick* v. *Whalen*, 49 N.Y.2d 224, 425 N.Y.S.2d 68 (1980) (A16-A26). The holding by the Court of Appeals of New York in *Solnick* adopted a "next

nearest context standard" to determine the period of limitation for declaratory challenges to administrative actions (A21). Pursuant to this "next nearest context standard" analysis, a litigant must "inquire into the kind of action that would have been most likely to raise the same substantive issues had there been no declaratory action available, and determine what the statute of limitations would have been on such next nearest action." (A21). Additionally, the Court of Appeals of New York in *Solnick* distinguished its prior holding in *Lakeland Water District* v. *Onondaga County Water Authority*, 24 N.Y.2d 400, 301 N.Y.S.2d 1 (1969). The Court of Appeals of New York in *Solnick* (deemed controlling in the case at bar) distinguished the *Lakeland* holding that an Article 78 proceeding was appropriate only in "a determination more accurately classified as administrative rather than legislative" (A23-A24).

It must be emphasized the gravamen of Petitioners' challenge is that Respondent determined all school districts in New York would receive less than full state aid for acquisition of certain facilities. Although Respondent's immediate decision had an individual impact upon the Petitioners,[6] it is the threshold determination of Respondent not to provide full state aid to any school district that motivated the present declaratory action. Given this fact, the holdings by the Court of Appeals of New York regarding the proper remedy (and the resultant bar if the wrong remedy is selected) to redress Petitioners' wrong are at best vague and uncertain. As this Court noted in *Arnett* v. *Kennedy*, 416 U.S. 134, 159 (1974), the origins of the vagueness doctrine stemmed from the "idea of fairness". Also, as the Court noted previously in *Jordan* v. *De George*, 341 U.S. 223, 231-232 (1950) while applying the vagueness test to a civil action, "The test (for determining vagueness) is whether the language conveys sufficient definite warning as to the proscribed conduct when measured by common understanding and practices." Again, in *Connolly* v. *General Construction Co.*, 269 U.S. 385, 391 (1926), this Court held, "A statute which either forbids or requires the doing of an act in terms so vague

that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law."[7]

Applying the aforementioned authorities to the case at bar, it is evident that New York law has failed to provide a constitutionally definitive construction of the controlling statute of limitation for Petitioners to apply when bringing the present declaratory action. *A fortiori*, New York law fails even to supply any specific statutory period of limitation for declaratory actions.[8] Instead, the Petitioners are relegated to a constrained "next nearest context standard" analysis (A21) or an "administrative rather than legislative" (A24) distinction to determine the statute of limitations for a declaratory action. Clearly, this vagueness in a fundamental issue such as the statute of limitations renders the controlling New York law unconstitutionally vague.

Finally, the Petitioners have suffered under New York law from uncertain and arbitrary executive and judicial action. Such a circumstance is clearly subject to constitutional remedy by this Court:

> Certainly, a precondition to the Court's accepting an argument of uncertainty seems to be if the statute is in fact more uncertain - offering less warning to anyone who should bother to consult it, laying down fewer lines of restraint upon the caprice of juries, agencies and judges and permitting less efficient delimitation of specific factual and legal issues for purposes of effective federal review - than the mine run of statutes. Vagueness is not an extraneous ploy or a judicial *deus ex machina* but rather has a very intimate connection both with the substance of individual freedom from arbitrary and discriminatory governmental action, and, as has been indicated, with the federal institutional processes established to protect that freedom.[9]

Surely, the manifest vagueness in the applicable period of limitations for declaratory actions existing when the instant proceeding was originally brought cannot be constitutionally remedied with, at best, today's less ambiguous construction by the Court of Appeals of New York.[10]

In the present action, the ready rulings by the trial court and next appellate court upholding the timeliness of Petitioners' declaratory action attest to the manifest unconstitutional vagueness of the controlling New York law on the issue at bar. The ramification of this Court of Appeals of New York decision is that Petitioners were made uncertain as to the controlling period of limitations for declaratory actions. And, this state engendered uncertainty barred Petitioners' present action. While that application of state law may eliminate perceived dilatory claims from crowded court calendars, it is nevertheless clearly unconstitutional, prudentially unwise, and fundamentally unfair. (*Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972)).

CONCLUSION

The importance of the questions raised herein and the manifest constitutional ramifications of the results merit review by the United States Supreme Court.

Respectfully submitted,

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Dated: July 18, 1980

CERTIFICATE OF COUNSEL

STATE OF NEW YORK)
COUNTY OF ONONDAGA)

I certify that I have examined the foregoing Petition for a Writ of Certiorari and that in my opinion it is well-founded and the cause is one in which the Petition should be granted.

Dennis G. O'Hara
Counsel of Record for Petitioners

FOOTNOTES

1. The property interest asserted by the Petitioners is the entitlement to full state aid without offsets for cost allowances. See, N.Y. Educ. Law, Section 1950(13) (McKinney's Supp. 1979). The offsets for cost allowances assessed by the Respondent resulted in increased payment by each Petitioner, ranging from $28,745.01 for the Petitioner Sandy Creek Central School District, to $111,903.32 for the Petitioner Central Square School District. The combined cost increase to the Petitioners from the Respondent's action was $572,782.55.

2. *Southern Dutchess Country Club* v. *Town Board of Fishkill*, 18 N.Y.2d 870, 276 N.Y.S.2d 121 (1966); *Palitto* v. *Cohaland*, 8 N.Y.2d 1065, 207 N.Y.S.2d 281 (1960); *Neddo* v. *Schride*, 270 N.Y. 97, 200 N.E. 657 (1936); *People ex rel Trustees* v. *Board of Supervisors*, 131 N.Y. 468, 30 N.E. 488 (1892); *Brent* v. *Hoch*, 13 A.D.2d 505, 211 N.Y.S.2d 853 (1961).

3. *Northwestern National Insurance Co.* v. *Pink*, 288 N.Y. 359, 43 N.E.2d 442 (1942); *People ex rel Village of Mamaroneck* v. *Public Serv. Comm.*, 238 N.Y. 588, 144 N.E. 903 (1924); *Town Board of Poughkeepsie* v. *City of Poughkeepsie*, 22 A.D.2d 270, 255 N.Y.S.2d 549 (1964); *People ex rel Central Park, North and East Railroad Co.* v. *Willcox*, 194 N.Y. 383, 87 N.E. 517 (1909); *People ex rel Consolidated Water Co.* v. *Maltbie*, 275 N.Y. 357, 9 N.E.2d 261, appeal dismissed 303 U.S. 158 (1937).

4. (Citing, *In re Guardian Life Ins. Co.* v. *Bohlinger*, 308 N.Y. 174, 124 N.E.2d 110 (1954); *Barry* v. *O'Connell*, 303 N.Y. 46, 100 N.E.2d 127 (1951); *In re New York Edison Co.* v. *Maltbie*, 244 A.D. 685, 281 N.Y.S. 223, aff'd 271 N.Y. 103, 2 N.E.2d 277 (1934).

5. See generally, the Court of Appeals efforts to reduce court calendars: New York Law Journal (N.Y.L.J.) June 26, 1980 at 1, col. 3; N.Y.L.J. Jan. 31, 1980, at 1, col. 3; N.Y.L.J., Jan. 2, 1980, at 1, col. 2; N.Y.L.J., Nov. 5, 1979, at 1, col. 2; N.Y.L.J., Nov. 1, 1979, at 1, col. 2; N.Y.L.J., Oct. 31, 1979, p. 1, col. 2.

6. See, note 1 infra.

FOOTNOTES (cont'd.):

7. Citing, *International Harvester Co.* v. *Kentucky*, 234 U.S. 216 (1914) and *Collins* v. *Kentucky*, 234 U.S. 634 (1914).

8. Although in New York an Article 78 proceeding (A14) has a specific statutory period of limitation (A13), a declaratory judgment action (A13) has no specific statutory period of limitation.

9. Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67, 88 (1960).

10. Freund, The Supreme Court and Civil Remedies, 4 Vand. L. Rev. 533, 540-41 (1951).

APPENDIX

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OPINION BELOW BY COURT OF APPEALS OF NEW YORK.

State of New York
Court of Appeals

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3 No. 206
Board of Education of The
Altmar-Parish-Williamstown
Central School District, et al.,
Respondents,
vs.
Gordon Ambach, as Commissioner
of Education of the State of
New York, Appellant.

MEMORANDUM:

The order of the Appellate Division should be reversed, with costs, and the complaint dismissed.

Plaintiffs' action should be dismissed as being time-barred. In this action, plaintiffs seek review of the Department of Education's determination limiting State aid reimbursement for the cost of acquiring facilities from the State Dormitory Authority (see Education Law, § 1950, subd 13) by utilizing the cost allowance scheme set forth in subdivision 6 of section 3602 of the Education Law. Although this action is one for a declaratory judgment, inasmuch as the resolution of rights sought by the parties could have been obtained in a CPLR Article 78 proceeding, the applicable statute of limitations is the four-month statute governing proceedings under article 78. (Solnick v Whalen, 49 NY2d 224.)

Here, plaintiffs learned of the Department of Education's determination to limit reimbursement

by utilizing cost allowances on May 24, 1976, at a meeting with officials of the Education Department's division of finance. Certainly, the right to institute this action would have accrued no later than September 15, 1976, the date upon which the first reimbursement payment, reflecting cost allowances, was made. Thus, the instant action, commenced some ten months thereafter, must be deemed time-barred.

* * * * * * * * * * * * * * * * *

Order reversed, with costs, and the complaint dismissed in a memorandum. All concur.

Decided April 29, 1980

OPINION BELOW BY NEW YORK STATE SUPREME COURT, APPELLATE DIVISION.

BOARD OF EDUCATION OF the ALT-MAR - PARISH - WILLIAMSTOWN CENTRAL SCHOOL DISTRICT et al., Respondents,

v.

Gordon AMBACH, as Commissioner of Education of the State of New York, Appellant.

Supreme Court, Appellate Division, Third Department.

July 13, 1978.

Before MAHONEY, P. J., and KANE, STALEY, MAIN and LARKIN, JJ.

LARKIN, Justice.

Plaintiffs are the component school districts of the Board of Cooperative Educational Services for the Sole Supervising District of Oswego County, New York (BOCES). BOCES entered into certain preliminary agreements with the State Dormitory Authority pursuant to which the Dormitory Authority undertook to finance the construction of two buildings for BOCES, to be known as the Area Education Center. BOCES agreed to pay the Dormitory Authority the principal and interest on bond anticipation notes that were issued by the Authority to finance the construction. Pursuant to relevant provisions of the Education Law, these payments by BOCES were assessed back to the component school districts, the plaintiffs herein.

OPINION BELOW BY NEW YORK STATE SUPREME COURT, APPELLATE DIVISION.

By chapter 33 of the Laws of 1976, effective March 12, 1976, the Legislature added subdivision 13 to section 1950 of the Education Law, authorizing boards of cooperative educational services and their component school districts to enter into agreements to acquire facilities from the Dormitory Authority and declaring that such acquisitions would be a school district purpose for which school districts could expend money and contract indebtedness. Paragraph (f) of subdivision 13 provides: "State aid on account of the acquisition of such facilities shall be paid to each component school district based upon its respective debt service or share thereof paid pursuant to the agreement herein provided for, and upon its respective aid ratio".

Plaintiffs entered into an agreement with BOCES to purchase the subject facility from the Dormitory Authority whereby each plaintiff agreed to pay a specified share of the cost of the so-called "buy-out". Thereafter, each plaintiff either adopted a bond resolution authorizing the school district to issue serial bonds for its share of the Dormitory Authority obligation or made other provisions pursuant to the Local Finance Law. This action was commenced after the defendant Commissioner of Education determined that State aid for the project would not be paid at 100%, but would be subject to "cost allowance considerations". Upon an application by plaintiffs for summary judgment, Special Term concluded that section 1950 (subd. 13, par. [f]) of the Education Law required the payment of State aid on a 100% basis, without considering cost allowance factors. We agree with Special Term.

OPINION BELOW BY NEW YORK STATE SUPREME COURT, APPELLATE DIVISION.

By chapter 728 of the Laws of 1976, effective July 24, 1976, the Legislature added subdivision 14 to section 1950 of the Education Law, authorizing boards of cooperative educational services and their component school districts to enter into contracts for the acquisition or construction of facilities and declaring that such acquisition or construction would be a school district purpose for which school districts could expend money and contract indebtedness. Paragraph (f) of subdivision 14 provides:

> State aid on account of the acquisition or construction of such facilities shall be paid to each component school district based upon its respective debt service or share thereof paid pursuant to the agreement herein provided for, and upon its respective aid ratio. Any such computation of state aid shall further be based upon the cost of such acquisition, or construction, and including incidental costs, to the board of cooperative educational services but not to exceed the cost allowance set forth in subdivision six of section thirty-six hundred two of this chapter. (Emphasis added.)

Accordingly, the statute authorizing boards of cooperative educational services and their component school districts to acquire and construct facilities in general and providing State aid therefor specifically requires that cost allowance be considered in calculating the State aid (Education Law, §1950, subd. 14, par. [f]). In contrast, the statute authorizing boards of cooperative educational services and their component school

districts to acquire facilities from the Dormitory Authority and providing State aid therefor contains no reference to cost allowance (Education Law, §1950, subd. 13, par. [f]). A fair reading of these parallel statutes, both enacted in 1976, persuades us that Special Term correctly ruled that the Legislature, by omitting a reference to cost allowance in section 1950 (subd. 13, par. [f]), the statute in issue herein, meant to prohibit the defendant from using cost allowances in computing State aid thereunder.

We have considered the remaining arguments of the defendant and find them to be without merit.

The order and judgment should be affirmed, with costs.

Order and judgment affirmed, with costs.

MAHONEY, P. J., and KANE, STALEY and MAIN, JJ., concur.

OPINION BELOW BY SUPREME COURT OF NEW YORK.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE BOARD OF EDUCATION OF THE ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE HANNIBAL CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE CENTRAL SQUARE CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE PHOENIX CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MEXICO CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE OSWEGO CITY SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE PULASKI CENTRAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE SANDY CREEK CENTRAL SCHOOL DISTRICT and THE BOARD OF EDUCATION OF THE FULTON CITY SCHOOL DISTRICT,

Plaintiffs,

-against-

GORDON AMBACH, as Commissioner of Education of the New York State Education Department,

Defendant.

Supreme Court, Albany County Special Term,
October 14, 1977

Justice Edward S. Conway, presiding

CONWAY, J:

This is a motion by the plaintiffs for an order for summary judgment for the relief prayed for in the complaint on the ground that there are no

triable issues of fact and there is no merit to the defenses asserted in the answer.

The plaintiffs are the component school districts of the Oswego County Board of Cooperative Educational Services (hereinafter referred to as Oswego BOCES). They entered into two preliminary agreements dated July 1, 1968 and February 29, 1974 [sic], and a supplemental preliminary agreement dated June 27, 1974, with the Dormitory Authority of the State of New York, pursuant to which the Dormitory Authority undertook to finance the construction of certain school facilities on behalf of Oswego BOCES, to be known as the Area Education Center.

In consideration for the Dormitory Authority's construction of these facilities, Oswego BOCES agreed to pay to the Dormitory Authority the principal and interest on bond anticipation notes that were issued by the Dormitory Authority to finance the construction of these facilities. In the supplemental preliminary agreement of June 27, 1974, it was agreed that the amount of bond anticipation notes issued by the Dormitory Authority would not exceed $2,548,335. All of the charges of principal and interest incurred by the Oswego BOCES were assessed back against each of the plaintiff component school districts pursuant to the relevant provisions of the Education Law.

Thereafter, Chapter 33 of the Laws of 1976 was passed by the New York State Legislature, effective March 12, 1976, which added Subdivision 13 to Section 1950 of the Education Law which provided, inter alia, that a board of cooperative

educational service and its component school districts could enter into agreements to acquire facilities from the Dormitory Authority and any such acquisition would be declared a school district purpose for which said school district could spend money and contract indebtedness. This section also provided that a school district could issue bonds or bond anticipation notes for the purpose of acquiring these facilities from the Dormitory Authority, and after payment was made to the Dormitory Authority by the component school districts, title to the facilities would vest in the board of cooperative educational service.

Section 1950, subd 13 (f) of the Education Law provides:

> "State aid on account of the acquisition of such facilities shall be paid to each component school district based upon its respective debt service or share thereof paid pursuant to the agreement herein provided for, and upon its respective aid ratio."

The plaintiff component school districts and the Oswego BOCES entered into an agreement on March 25, 1976 under which agreement BOCES would acquire the facilities referred to above from the Dormitory Authority. Each of the plaintiffs then either adopted a bond resolution which authorized the school district to issue serial bonds for its share of the Dormitory Authority obligation, or made other provisions pursuant to the local finance law for the necessary funds.

OPINION BELOW BY SUPREME COURT OF NEW YORK.

On May 13, 1976, Oswego BOCES was informed by the defendant that the amount of State aid which would be paid to the plaintiffs pursuant to Section 1950, subd 13 (f) would not be 100% but would be reduced by application of a cost allowance factor as calculated in accordance with Section 3602, subd 6, Education Law (the General State Aid Statute).

The defendant subsequently apportioned the State aid to the plaintiffs for the 1976-77 school year in the following manner: 8 1/3% portions were paid to Oswego BOCES for distribution to the plaintiffs on or before September 15, October 15 and November 15 of 1976, and an estimated 25% portions of State aid were paid on or before April 15, May 15 and June 15, 1977. As a result of the defendant's utilization of cost allowances in apportioning State aid payments, the plaintiffs received State aid on the Dormitory Authority agreement at a rate of 78.7% rather than 100%. This reduction, resulted in an increase in each plaintiffs local share, which increase ranged from $28,745 for the plaintiff Sandy Creek School District to $111,902.32 for the plaintiff Central Square Central School District.

In this motion for summary judgment, the plaintiffs seek a declaratory judgment declaring that defendant's utilization of cost allowance in determining the amount of State aid to be paid pursuant to Section 1950, subd 13(f) Education Law is not authorized by said statute and that the plaintiffs should be accorded a 100% share of State aid as a result of their agreement with Oswego BOCES to acquire facilities from the Dormitory Authority.

OPINION BELOW BY SUPREME COURT OF NEW YORK.

The defendant contends in his answer that all building projects are subject to cost allowance adjustments in the payment of State aid pursuant to Section 3602 Education Law, and that aid paid with reference to Section 1950, subd 13 (f) Education Law must be calculated in accordance with Education Law, Section 3602, subd 6, and the term "State aid" can have no other meaning. The defendant further contends that plaintiffs have an available remedy at law, an Article 78 proceeding, and must first pursue such remedy prior to instituting this declaratory judgment action, and further, that the four-months statute of limitations has run and that the instant action must be dismissed as time barred.

This Court cannot agree with the contentions of the defendant. Where the legality or meaning of a statute made by an administrative official is in dispute and no question of fact is involved, direct resort may be had to an action for a declaratory judgment (Board of Education v. Rickard, 32 AD2d 135 (Third Department)). The plaintiffs are seeking a determination in the instant case as to the correct interpretation of Section 1950, subd 13 (f) Education Law and there are no questions of fact before the Court. Therefore, the proceeding has been properly commenced as a declaratory judgment action and even though an Article 78 proceeding could have been commenced, it was also the plaintiffs right to commence a declaratory judgment action.

Since the utilization of cost allowances is not specifically authorized by Section 1950, subd 13 (f) Education Law, and cost allowance utilization

is specifically permitted in other sections of the Education Law, it was the legislative intent not to authorize its use under Section 1950, subd 13 (f) Education Law (see McKinney's Statutes, Section 74), and the omission of cost allowances, even though it was in the predecessor statute (Section 1958, subd 5 (a) Education Law), demonstrates a deliberate act on the part of the Legislature not to include cost allowances. If the intention of the Legislature was to include cost allowances, they would have plainly stated such intention.

In view of the foregoing, the plaintiffs' motion for summary judgment is granted for the relief prayed for in the complaint, to the following extent:

That a declaratory judgment be made and entered that the defendant New York State Education Department's utilization of cost allowances in alloting State aid pursuant to Section 1950, subd 13 (f) is not authorized by said statute;

That the defendant New York State Education Department be permanently enjoined from utilizing cost allowances in determination of State aid pursuant to Section 1950, subd 13 (f) of the Education Law;

That plaintiffs be accorded a one hundred percent (100%) share of State aid pursuant to Section 1950, subd 13 (f) for each of the plaintiff component school districts share under their agreement with Oswego BOCES to acquire facilities from the Dormitory Authority.

Plaintiffs to submit an order consistent herewith.

N.Y. CPLR SECTION 217 (McKINNEY'S 1980).

§ 217. Proceeding against body or officer; four months

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of such refusal, was under a disability specified in section 208, within two years after such time.

N.Y. CPLR SECTION 3001 (McKINNEY'S 1980).

§ 3001. Declaratory judgment

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

N.Y. CPLR SECTION 7801 (McKINNEY'S 1980).

§ 7801. Nature of proceeding

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

N.Y. CPLR SECTION 7803 (McKINNEY'S 1980).

§ 7803. Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

OPINION BY COURT OF APPEALS IN NEW YORK IN SOLNICK v. WHALEN.

State of New York
Court of Appeals

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3 No. 599
Anne Solnick, &ors., d.b.a.
Dover Nursing Home,
Respondents,
vs.
Robert P. Whalen, Commissioner
of Health for the State of
New York, et al.,
Appellants.

JONES, J.

A declaratory judgment action to challenge a determination adjusting Medicaid reimbursement rates for an individual nursing home facility for lack of procedural due process is time-barred when it is brought more than four months after notification of the rejection of its appeal from the audit on which the adjustments were based and more than four months after notification of its adjusted reimbursement rates.

Plaintiffs are owners and operators of the Dover Nursing Home, a facility which renders care and treatment to sick and elderly patients for which reimbursement is provided under the federal Medicaid program (42 USC 1396, et seq.). In this state the program is administered by the New York State Department of Social Services, and the rate of reimbursement to eligible nursing homes is determined and certified by the Commissioner of Health and approved by the Director

of the Budget pursuant to Public Health Law, § 2807, predicated in part on costs reported by the facilities. Incident to rate-determination, periodic audits of participating nursing homes are conducted by the Department of Health.

During 1975 the Department conducted such an audit of the Dover Nursing Home for the year 1969, the reported costs for which year had served as the basis for rates of reimbursement which had been paid for services rendered in portions of 1970 and 1971. The audit report dated December 4, 1975, a copy of which was sent to the nursing home, disallowed $17,987 of expenses that had been reported by the home. On December 22, 1975 by letter addressed to the Department of Health, the facility appealed $9,006 of disallowed items and also sought an additional allowance for commercial rent tax paid. On May 20, 1976 the Department's Rate Review Board considered the nursing home's objections but left undisturbed the report of the audit with respect to the disputed items, allowing only the additional commercial rent tax item when verified. By letter dated June 1, 1976 plaintiffs were notified that the Commissioner of Health had determined, after recommendation by the Review Board, that the auditor's judgment should be upheld with the additional allowance for the commercial rent tax. Thereafter, on June 25, 1976, a letter was sent to the nursing home setting forth downward adjustments of reimbursement rates for 1970-1971 based on the 1969 audit, accompanied by advice that the State and local social service departments were being notified of the rate revisions.

OPINION BY COURT OF APPEALS IN NEW YORK IN SOLNICK v. WHALEN.

On January 6, 1977 plaintiffs commenced the present action for a declaration that any attempted reimbursement rate reduction or recoupment of alleged overpayments as a result of the 1969 audit was illegal by reason of a lack of due process attending the procedure by which the rate reductions had been determined and for an order enjoining recoupment of alleged overpayments of reimbursement (by withholding from current reimbursement) without plaintiffs' having "a full adversary due process hearing before an impartial trier of fact". Defendants' answer pleaded an affirmative defense of statute of limitations.

Special Term, holding untenable the statute of limitations defense, granted judgment favorable to plaintiffs declaring the challenged reimbursement rate adjustments void, enjoining collection of recoupment, and remanding the matter to the Commissioner of Health for a due process hearing on plaintiffs' challenges to the rate reductions. The Appellate Division, concurring in Special Term's holding that the action was not time-barred, modified the lower court's order by deleting the declaration of invalidity and the injunction against recoupment and amending the remand provision to direct that a hearing be held by the Commissioner of Health within 90 days of the effective date of the prospective Medicaid rate adjusted to recoup overpayment resulting from the 1969 audit.

We reverse and dismiss the action on the ground that it was instituted beyond the time within which it could properly be brought.

In rejecting defendants' claim of untimeliness the Appellate Division applied the six-year statute

of limitations prescribed by subdivision 1 of section 213 of the CPLR for "an action for which no limitation is specifically prescribed by law", and concluded that plaintiffs' action was timely, having been instituted less than seven months after notification on June 25, 1976 of the reimbursement rate adjustments made pursuant to the 1969 audit and only slightly more than six months after notification on June 1, 1976 that the Commissioner of Health had rejected their appeal of the audit report; it held inapplicable the four-month limitation period provided by CPLR 217 for proceedings against a body or officer, which defendants contended barred the action.

The critical question is which statute of limitations determines the time within which this declaratory judgment action must have been brought. An examination of Article 2 of the CPLR -- the article devoted to "Limitations of Time" -- discloses that no general period of limitation is specifically prescribed therein for a declaratory judgment action; nor is one to be found in any other statutory provision. That is not to say however that the six-year catch-all limitation of subdivision 1 of section 217 therefore automatically or necessarily governs all such actions. The declaratory judgment action, a fairly new entrant on the civil procedure field of New York,[1] is peculiarly different from the actions listed in Article 2 and there assigned limitation periods, in that

1. The declaratory judgment first became available in this state with the enactment of section 413 of the Civil Practice Act in 1921.

the latter actions seeking coercive relief are described (except in the catch-all provision of § 213[1]) by reference to the gravamen of the claim or the status of the defendant party. No such description attaches generically to actions for declaratory relief instituted pursuant to CPLR 3001; it is the nature of the relief sought -- i.e., declaratory as distinguished from coercive -- rather than its substance, which gives the action its identity.

In order to determine therefore whether there is in fact a limitation prescribed by law for a particular declaratory judgment action it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought -- factors we have previously identified as pertinent to selection of the applicable statute of limitations (Sears, Roebuck & Co. v Enco Assoc., 43 NY2d 389, 396). If that examination reveals that the rights of the parties sought to be stabilized in the action for declaratory relief are, or have been, open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action. In that event there is a limitation specifically prescribed by law and the catch-all provision of CPLR 213(1) is not applicable. If the period for invoking the other procedural vehicle for relief has expired before the institution of the action for declaratory relief, the latter action also is barred. If the alternative action or proceeding is not time-barred, however, -- as will often be the case in light of the fact that declaratory judgment actions are

frequently brought before there has been conduct which might give rise to a right tc remedial or coercive relief -- then a challenge of untimeliness addressed to the declaratory judgment action must fail. A salutary result of the application of the limitation period appropriate to the other form of judicial proceeding will be to preclude resort by a dilatory litigant to the declaratory remedy for the purpose of escaping a bar of time which has outlawed the other procedure for redress (see Mundy v Nassau County Civ. Serv. Comm., 44 NY2d 352, 358). If no other form of proceeding exists for the resolution of the claims tendered in the declaratory judgment action, the six-year limitation of CPLR 213(1) will then be applicable.

The same consequence would follow from the application of what has been labeled the "next nearest context standard" -- "Inquire into the kind of action that would have been most likely to raise the same substantive issues had there been no declaratory action available, and determine what the statute of limitations would have been on such next-nearest action. Then just apply that statute of limitations to the declaratory action, not only as to what the basic period is, but as to other relevant matters, such as moment of accrual (which starts the statute running) and the like." (Practice Commentary by David D. Siegel, McKinney's Cons. Laws of N. Y., Book 7B, CPLR 3001, C3001:18, pp 369-370; cf. 1 Weinstein-Korn-Miller, NY Civ Prac, par 213.02, p 2-229.)

The next necessary inquiry must therefore be whether there was some other form of judicial proceeding -- barred by its limitation period at

the time this action was commenced -- which was available to plaintiffs for resolution of their challenge to the downward revision of their reimbursement rates. Defendants correctly identify such a vehicle as a proceeding instituted pursuant to Article 78 of the CPLR to review the determination made by the state agency. The fact that the challenge mounted to defendants' determinations is stated in terms of a constitutional objection (denial of due process hearing rights) does not serve to make unavailable an Article 78 proceeding -- the customary procedural vehicle for review of administrative determinations. That procedure was used without objection for the assertion of due process challenges to regulations for computation of hospital reimbursement rates in Matter of Jewish Mem. Hosp. v Whalen (47 NY2d 331).[2] In the case now before us the asserted lack of due process in the determination of the rate of reimbursement for plaintiffs was available as a question for review in such a proceeding under the third question authorized by CPLR 7803 -- whether the "determination was made in violation of lawful procedure [or] was affected by an error of law".

Plaintiffs' reliance on Matter of Lakeland Water Dist. v Onondaga County Water Auth. (24 NY2d 400) as authority for the proposition that "an order of an administrative agency fixing rates is deemed a legislative act" reviewable only in an

2. The respondents in that case contended that the proceeding was barred by the four-months statute of limitations. We held, however, that the proceeding had been instituted within four months of its accrual.

action for a declaratory judgment, not in a proceeding under Article 78, and that, consequently, an Article 78 proceeding was not an alternative available to them in which to assert their challenges to the reimbursement rate adjustments fixed by defendants, is misplaced. Neither Lakeland Water Dist. nor the cases following an applying it in our Court have involved situations such as the present in which the attack has been addressed to individualized rates established for a particular litigant. In Lakeland Water Dist. the challenge was to a resolution by the County Water Authority adopting an across-the-board schedule which increased rates and charges of the Authority applicable to all its customers. Thereafter, the proscription against use of Article 78 proceedings for challenges to the constitutionality of general legislative acts was restated when such attacks were launched on a zoning ordinance (Matter of Overhill Bldg. Co. v Delany, 38 NY2d 449), on a section of the Real Property Law (Matter of Gold v Lomenzo, 29 NY2d 468), on a provision of the New York City Rent Stabilization Law (Matter of Kovarsky v Housing & Development Admin. of City of N. Y., 31 NY2d 184) and on a section of the Highway Law (Matter of DuBois v Town Bd. of Town of New Paltz, 35 NY2d 617). In each of the cited instances the subject of the claim of unconstitutionality, for which an Article 78 proceeding was held to be an inappropriate remedy, was a rate increase, ordinance, local law or statute of general applicability (truly to be regarded as "legislative" action); in none was the object of attack an ad hoc determination of an individual party's right of reimbursement -- a determination

more accurately classified as administrative rather than legislative.[3]

This result is consonant with sound public policy, particularly where the action sought to be reviewed is that of a regulatory governmental agency. "The reason for the short statute is the

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3. We note that the Appellate Division, Third Department, in cases instituted as Article 78 proceedings to review individual Medicaid reimbursement rates, relying on the Lakeland Water District case, has stated that an Article 78 proceeding was not the proper vehicle, and pursuant to CPLR 103(c) has converted the litigation to declaratory judgment actions (e.g., Matter of Broadacres Skilled Nursing Facility v Ingraham, 51 AD2d 243; Matter of White Plains Nursing Home v Whalen, 53 AD2d 926, affd 42 NY2d 838, rearg den 42 NY2d 1015, cert den 436 US 1066; Matter of Park Crescent Nursing Home v Whalen, 55 AD2d 801, app dsmd 42 NY2d 975). In Matter of Birchwood Nursing Home v Whalen (70 AD2d 1020) the statement was again made but the court awarded what it regarded as proper Article 78 relief, different from that requested by the petitioner. In an earlier similar proceeding the court had declined to determine the proper character of litigation to challenge individual nursing home reimbursement rates, noting both the Lakeland Water District case and the fact that the Court of Appeals had only recently reviewed a nursing home rate determination regulation in an Article 78 proceeding in Matter of Sigety v Ingraham (29 NY2d 110), and entertained the suit "whether it be an article 78 proceeding or, in the alternative, an action for declaratory judgment" (Matter of Severino v Ingraham, 45 AD2d 564, 565). The Article 78 -- declaratory judgment issue has never heretofore been presented for review in our Court in the context of a challenge to an individual reimbursement rate. We observe that in none of the cases in the Third Department does it appear that a limitations problem was presented, nor does it appear that any practical consequence turned on whether the action was treated as an Article 78 proceeding or as a declaratory judgment action.

strong policy, vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammeled by stale litigation and stale determinations". (Mundy v Nassau County Civ. Serv. Comm., 44 NY2d 352, 359, supra, Breitel, C. J., diss.) Of special significance in the present instance is the impact on state and local budgetary planning which application of a six-year statute of limitations would introduce. One can visualize the fiscal complexity which would ensue if financial planning for a program with the broad ramifications of Medicaid were subjected to individual challenges for a period of up to six years. Moreover, one would expect that the financial planning of the providers of services as well would be benefited by prompt resolution of controversies with respect to final reimbursement rate determinations.

Finally, there remains the question whether the Article 78 proceeding that was available to plaintiffs to review the rate adjustments following the 1969 audit would have been time-barred when the present declaratory judgment action was commenced on January 6, 1977. It is clear that it would have been. Whether the right to institute such a proceeding be deemed to have accrued on June 1, 1976 when notice was given of the Department's rejection of the nursing home's appeal from the 1969 audit or on June 25, 1976 when plaintiffs were notified of the actual reimbursement rate adjustments applicable as a result of the audit, more than the four months permitted by CPLR 217 for the institution of an Article 78 proceeding had elapsed by January 6, 1977. It follows, from what has been said, that the declaratory judgment action then commenced was untimely.

OPINION BY COURT OF APPEALS IN NEW YORK IN SOLNICK v. WHALEN.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the action dismissed.

* * * * * * * * * * * * * * * * * *

Order reversed, with costs, and the action dismissed. Opinion by Jones, J. All concur.

Decided January 8, 1980

MEMORANDUM LETTER TO COURT OF APPEALS OF NEW YORK BY PETITIONERS.

March 31, 1980

Court of Appeals
Court of Appeals Hall
Albany, New York 12207

Re: The Board of Education of the Altmar-Parish-Williamstown Central School District, et al, v. Ambach.
Argued on March 25, 1980

To the Court:

At the conclusion of oral argument of the above captioned appeal, Mr. Justice Wachtler raised a question concerning the applicability, if any, of Solnick v. Whalen, which was decided by the Court on January 8, 1980.

Solnick enunciated a new standard to be utilized in determining the statute of limitations to be applied in declaratory judgment actions. The Solnick "next nearest context standard" requires that the substance of a declaratory judgment action be examined to determine if the rights of the parties can be resolved in an alternate proceeding for which there is a specific statute of limitations. If so, that specific statute of limitations will be applied to the declaratory judgment action.

In Solnick, this Court concluded that an Article 78 proceeding was open to the plaintiff because that case essentially concerned an administrative (as opposed to legislative) determination of an individual party's rights.

MEMORANDUM LETTER TO COURT OF APPEALS OF NEW YORK BY PETITIONERS.

It is apparent at the outset that Solnick is distinguishable from the present case because:

(1) Section 1950(13)(f) of the Education Law is a statute of general applicability; whereas the administrative determination under review in Solnick was limited to an individual party's rights;

(2) Although an Article 78 proceeding was appropriate in Solnick, the across-the-board nature of Section 1950(13)(f) precludes resort to such a proceeding in this case under Matter of Lakeland Water Dist. v. Onondaga County Water Auth. (24 N.Y.2d 400), which reiterated that:

> An Article 78 proceeding, it is settled, may not be utilized to review legislative action... (Supra, at 407); and

(3) The present case is not concerned with an adjudicatory determination reached subsequent to notice and hearing. Rather, it involves only the meaning and intent of a purely legislative action... of a statute of general applicability. Consequently, the ratio decidendi of Solnick is not applicable.

To apply the four month statute of limitations in the present case, the Court must necessarily overrule its decision in Lakeland and hold that an Article 78 proceeding may be utilized to challenge purely legislative action. If this is the Court's intention, it is respectfully contended that such a drastic reformulation of policy should be applied prospectively only. Equitably, it should not be used to preclude maintenance of this action which was commenced in 1977.

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Even if this Court determines to impose the Article 78 statute of limitations to this and other legislative challenges (and even if the Court determines to do so prospectively), respondents respectfully contend that there was no determination which was sufficiently "final and binding" so as to be reviewable in such a proceeding until the last State aid payment on June 15, 1977. It is unquestioned that a state agency must unambiguously pronounce a final and binding determination so that a party knows when they are aggrieved. (Jewish Memorial Hospital v. Whalen, 47 N.Y.2d 331 (1979) and Mundy v. Nassau County Civil Service Commission, 44 N.Y.2d 352 (1978)).

The Record on Appeal makes it clear that the parties engaged in a continuing dialogue on the question of State aid. The Record also makes it clear that the May 13, 1976 letter from the Associate Commissioner of Education to the respondents was, at the very least, equivocal on the question. To hold that there was a final and binding determination at any time prior to June 15, 1977 would impose an unfair burden on the public to react to implied refusals and would invite a floodgate of litigation four (4) months from whenever an arguably implied refusal by a state agency has occurred. (Castaways Motel v. C.V.R. Schuyler, 24 N.Y.2d 120, 126 (1967)).

Finally, a nunc pro tunc application of the recent Solnick decision to the respondents' claim brought in 1977 is inequitable; contrary to precedent in that it substitutes the judgment of the judiciary for the Legislature in establishing statute of limitations (In re: Dee, 257 A.D.531, 13 N.Y.S.

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2d 719 (3rd Dept. 1939), aff'd 282 N.Y. 617 (1940)); and raises questions of a constitutional dimension. (Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945)).

We thank the Court for its indulgence in considering this letter memorandum.

Very truly yours,

O'HARA AND O'HARA

EAO'H:ejb

By: Edward A. O'Hara III

cc: Robert D. Stone, Esq.